

2008

State of Utah v. Leroy Worthen : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Utah v. Worthen*, No. 20080128.00 (Utah Supreme Court, 2008).
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IN THE UTAH SUPREME COURT

STATE OF UTAH

v.

LEROY Worthen.

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Case No. 20080128-SC

ON CERTIORARI TO THE UTAH COURT OF APPEALS

GUARDIAN ad LITEM's REPLY BRIEF

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UTAH APPELLATE

OCT 29 2008

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ARGUMENT

**1. IF THE PROMULGATORS WANTED TO DRAFT
A CONDITIONAL PRIVILEGE, THEY KNEW HOW TO DO SO.**

This Court, along with the Advisory Committee, was fully aware that the any rule of privilege, by its nature, would prohibit a full disclosure of information, including material and exculpatory information. Utah R. Evid 501 (2008) Adv. Comm. Note (“It is in the nature of evidentiary privileges that they interfere with establishment of the whole truth.”).

This Court, advisedly crafted the plain language of the psychotherapist-patient privilege such that it did not distinguish criminal from civil cases,¹ it provided no judicial balancing, it provided for no judicial override,² it provided for no in camera inspection, and it did not distinguish material and from immaterial communications or exculpatory from inculpatory communications.

Had this Court wanted to include such provisions, it would have done so, as it did when it promulgated other evidentiary privileges that distinguished between civil and criminal cases,³ included a balancing test,⁴ provided for judicial override,⁵ provided for

¹ In fact, Advisory Committee Note(2) to Rule 506 emphasized that the committee chose not to follow the earlier statutory privilege which distinguished between civil and criminal cases and instead “was of the opinion that the considerations supporting the privilege apply in both.” Utah R. Evid. 506 (2008) Adv. Comm. Note (2).

² Exception (d)(3) provides for a judicial override of an exception, not a privilege. Utah R. Evid. 506(d)(3) (providing for judicial override of exception for a court-ordered examination).

³ See e.g., Utah R. Evid. 502(a) (2008) (creating additional criminal provision for husband-wife privilege); Utah R. Evid. 505(d)(1) (2008) (creating exceptions to government informer privilege that distinguishes between criminal and civil cases); Utah R. Evid. 508(a) (7)(b) (2008) (distinguishing use of environmental report in criminal proceedings from use in administrative or civil proceedings).

⁴ See e.g., Utah R. Evid. 509(c) & (d) (2008) (court may weigh “interest of a continued free flow of information to news reporters” against “need for disclosure”).

⁵ See e.g., Utah R. Evid. 502(b)(4)(D) (court “may” refuse invocation of husband-wife privilege where interest of minor child or spouse may be adversely affected); Utah R. Evid. 505(d)(2) (judge may require identity of confidential informant); Utah R. Evid. 509(b) (judicial override where clear and convincing evidence supports disclosure of

in-camera inspection,⁶ and distinguished material from immaterial information and exculpatory from inculpatory information.⁷

2. NEITHER *CARDALL* NOR *BLAKE* FULLY ANALYZE THE CONDITION-AS-ELEMENT-OF-DEFENSE EXCEPTION.

Neither Cardall nor Blake provide helpful analysis regarding the condition-as-element-of-defense exception. Cardall mentions the exception in passing and only in the most conclusory manner.⁸ Blake's mention of the exception occurs in a footnote.⁹

confidential source information “necessary to prevent substantial injury or death”).

⁶ See e.g., Utah R. Evid. 505(d)(1) (government informer privilege); Utah R. Evid. 505(d)(2); Utah R. Evid. 508(a)(6) (environmental self-evaluation privilege); Utah R. Evid. 508(e)(2) (same); Utah R. Evid. 509(f) (upon initial determination that rule favors disclosure, court to conduct in camera review before making final determination).

⁷ See e.g., Utah R. Evid. 505(d)(1) (allowing in camera inspection upon showing that confidential informant has necessary information going to criminal guilt or innocence or material issue of civil case).

⁸ State v. Cardall, 1999 UT 51, ¶ 29, 982 P.2d 79 (“This alone appears to give Cardall the right to review S.F.’s school psychological records because the focus of his defense was the S.F. is a habitual liar, that she fabricated her story about being raped, that she is mentally and emotionally unstable, and that the records show that on at least one previous occasion these psychological traits led her to lie about an attempted rape or sexual touching by the school janitor.”).

⁹ State v. Blake, 2002 UT 113, ¶ 19 n.2, 63 P.3d 56 (“Blake seeks disclosure of the counseling records for use in impeaching the victim’s testimony. It is unlikely that impeachment evidence qualifies as an element of a claim or defense. However, we need not reach the question of whether an element of a claim or defense is implicated since Blake has not shown with reasonable certainty that the records he seeks contain exculpatory evidence.”).

Not that it should matter in this case given that the Defendant conceded, and the trial court found that the Child's condition was not at issue. R.115-111 (finding that Defendant conceded that "the record does not support a finding that there is reasonable certainty that the alleged victim is mentally unstable. The Court agrees.").

Neither Cardall, nor Blake, nor even Ritchie¹⁰ nor Davis, explain what it takes for a patient's physical, mental or emotional state to rise to the level of a condition, nor what it takes for such a condition to be at issue, nor what it takes for the issue to rise to the level of an element of a claim or defense. Nor did the four cases address rights and interests belonging to the victim, the witness, the treating professional or the treating institution.¹¹ Nevertheless, the four cases help to describe protections available after the protections to the witness, the victim, the therapist and the treating institution have been exhausted.¹²

¹⁰ In Ritchie, the Court specifically declined to address the implications of an absolute privilege, such as Utah's psychotherapist-patient privilege or Utah's clergy-penitent privilege. Pennsylvania v. Ritchie, 480 U.S. 39, 57, n.14 (the Court "expressed[ed] no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to anyone. . . .").

¹¹ See Scott v. Hammock, 870 P.2d 947, 949 (Utah 1994) (where the clerical institution, (the Church of Jesus Christ of Latter-day Saints), intervened in a private tort action filed by a woman against her adoptive father, to assert the clergy-penitent privilege, to withhold records from an excommunication hearing, even though the penitent was capable of asserting the privilege and in fact did so).

¹² Some privileged communication is also subject to separate rules, laws and even constitutional provisions. For instance, husband-wife confidential communications are

This Court should determine that the four cases do not control, and in fact do not even provide a helpful analysis of the condition-as-element-of-claim-or-defense exception. This Court should look to the plain language of the exception, as well as to the trial court's finding, to determine that the Child's physical, mental or emotional condition was not at issue, and was certainly not an element of a claim or defense.

CONCLUSION

This Court should apply the plain language of the psychotherapist-patient rule of privilege to determine that the confidential communication is protected by privilege and there it is not subject to disclosure, discovery or admission. This Court should reverse the appellate court's opinion and should direct the trial court to protect the Child's confidential communication from disclosure.

DATED this 29th day of October 2008.


MARTHA PIERCE
Guardian ad Litem

protected by evidentiary rule 502, as well as by Utah Code Ann. § 78B-1-138(1)(a) (2008) (neither husband or wife maybe examined as to any communication made during the marriage), as well as Utah Const. art. I, § 12 ("a wife shall not be compelled to testify against her husband, nor a husband against his wife."). Likewise the attorney-client confidential communications are protected by rule of privilege 504, as well as by attorney rules of ethics and confidentiality. Utah R. Prof. Cond. 1.6. See also Spratley v. State Farm Mut. Auto. Ins. Co., 2003 UT 39, ¶ 14 n.2, 78 P.3d 603 (noting that an attorney-client privilege can be waived while the attorney's duty of confidentiality is still in force).

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of October 2008, I caused to be mailed, postage prepaid, two true and exact copies of the Guardian ad Litem's Brief to:

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